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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

9 DEREK V. WILLIAMS,

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11 Plaintiff,

v.

12 SANTOS LAMAS, *et al.*

13  
14 Defendants.

No. 08-5520RJB/JRC

REPORT AND RECOMMENDATION

NOTED FOR:

June 5, 2009

15  
16 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned  
17 Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate  
18 Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff is proceeding *in forma pauperis* (Dkt. # 3).  
19 This matter is before the court on defendant's motion to dismiss the complaint at the 12 (b)(6)  
20 stage (Dkt # 12). Plaintiff has responded to the motion (Dkt # 16). Defendants have replied (Dkt  
21 # 19). This matter is ripe for review and a Report and Recommendation. Having reviewed the  
22 record, the court recommends this defendant's motion be **GRANTED** as to plaintiff's Eighth  
23 Amendment Claim, but that plaintiff be given leave to amend so he can articulate the basis and  
24 facts for his Fourteenth Amendment Due Process Claim and his Sixth Amendment Equal  
25 Protection Claim.  
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Report and Recommendation- 1

1 FACTS

2 Plaintiff has an allergy to fish. He alleges that ingestion of fish can be fatal (Dkt. # 4,  
3 complaint page 3). Defendants do not contest that plaintiff has the alleged allergy. Plaintiff's  
4 Health Status Report, "HSR", for a no-fish diet was allegedly removed by Mrs. Lachney, a  
5 dietician at the McNeil Island Corrections Center (Dkt. # 4, complaint, page 3). Defendant  
6 Lachney did not accept service by mail and the plaintiff has not moved to have her personally  
7 served. Thus, this defendant is not before the Court.  
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9 Plaintiff has attached his level three grievance response to the complaint (Dkt. # 4,  
10 attachments). In that response the headquarters grievance coordinator, Devon Schrum, who is  
11 not a named party, informs the plaintiff that the Department of Corrections does not have a no-  
12 fish diet. Mr. Schrum also instructs plaintiff that fish is not served often and inmates with an  
13 allergy to fish are expected to self monitor and not eat fish when it is served. Mr. Schrum avers  
14 that the menu provides sufficient calories for self monitoring and notes that plaintiff also receives  
15 snacks in addition to the mainline menu. From the record it appears plaintiff receives these  
16 additional snacks, "sack lunches", because he is a diabetic (Dkt. # 4, page 3). Mr. Schrum  
17 indicates in his response that if plaintiff has concerns regarding weight loss he should "Kite  
18 medical" (Dkt. # 4, attachments).  
19

20 The named defendants in this action are:

- 21 1. The Food Service Manager, Santos Lamas.  
22 2. The McNeil Island's Grievance Coordinator, Mark Wesner.  
23 3. Dietician Mrs. Lachney. (This defendant did not accept service by mail and has  
24 not been served).  
25 4. Superintendent of the McNeil Island Corrections Center, Ron Van Boening.  
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(Dkt. # 4, complaint).

1 Plaintiff does not specifically indicate in the complaint which Amendments of the United  
2 States Constitution he claims defendants violated by their actions (Dkt. #4). Defendants have  
3 fairly characterized the complaint as raising an Eighth Amendment Claim regarding conditions  
4 of confinement (Dkt. # 12, pages 1 and 2). In his response, Plaintiff states that he is raising  
5 claims for violation of his right to Due Process under the Fourteenth Amendment, his right to  
6 Equal Protection under the Sixth Amendment, and a violation of the prohibition against cruel and  
7 unusual punishment found in the Eighth Amendment (Dkt. # 16).

9 The defendants move to dismiss arguing that they are entitled to dismissal of the  
10 complaint: 1) for failure to state a claim; 2) for lack of personal participation; and 3) because  
11 they are entitled to qualified immunity from suit (Dkt. # 12). Defendant's reply simply reiterates  
12 the three arguments they raise in their initial motion (Dkt # 19).

13 Plaintiff is no longer incarcerated. Plaintiff has not set forth any facts regarding his  
14 contention that he suffered undue physical and mental hardship. (Dkt. # 4, page 4).

#### 16 STANDARD OF REVIEW

17 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), has modified the standard of  
18 review. The Supreme Court in Bell espouses that to apply the language from the earlier Gibson  
19 case literally eviscerates the possibility of a rule 12 dismissal. Conley v. Gibson, 355 U.S. 41,  
20 45-56 (1957). A Rule 12(b)(6) motion may be based on either the lack of a cognizable legal  
21 theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v.  
22 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as  
23 admitted and the complaint is construed in the plaintiff's favor. Keniston v. Roberts, 717 F.2d  
24 1295 (9th Cir. 1983). While a court liberally construes pro se pleadings the court cannot supply  
25 facts that are not plead. Pena v Gardner, 976 F.2d 469 (9th Cir. 1992). "While a complaint  
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1 challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a  
2 plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels  
3 and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
4 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-556 (2007). “Factual allegations must be  
5 enough to raise a right to relief above the speculative level, on the assumption that all the  
6 allegations in the complaint are true (even if doubtful in fact).” *Id.* at 556. Plaintiffs must allege  
7 “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 571.  
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## 9 DISCUSSION

### 10 1. The Eighth Amendment claim.

11 The Eighth Amendment prohibits infliction of cruel and unusual punishment. The Eighth  
12 Amendment is violated when an inmate is deprived of the minimal civilized measure of life's  
13 necessities. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). To establish an Eighth Amendment  
14 violation, an inmate must allege both an objective element -- that the deprivation was sufficiently  
15 serious -- and a subjective element -- that a prison official acted with deliberate indifference.  
16 Rhodes v. Chapman, 452 U.S. at 359-60. To constitute deliberate indifference, an official must  
17 know of and disregard an excessive risk to inmate health or safety. The official must be aware of  
18 facts from which the inference could be drawn that a substantial risk of serious harm exists; and  
19 the official must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 1983 (1994).  
20

21 Only deprivations that deny inmates the minimal civilized measures of life's necessities  
22 are sufficient to rise to the level of an Eighth Amendment violation. Wilson v. Seiter, 501 U.S.  
23 294, 298 (1991). For prison conditions to rise to the level of cruel and unusual punishment there  
24 must be evidence of a serious physical or emotional injury resulting from the challenged  
25 condition. Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993), cert. denied, 510 U.S. 949 (1993);  
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1 Lopez v. Robinson, 914 F.2d 486, 490 (4th Cir. 1990). Further, differences in judgment between  
2 an inmate and prison personnel do not constitute cruel and unusual punishment. Franklin v.  
3 Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981) (A difference of opinion between a medical  
4 provider and an inmate does not rise to the level of a constitutional violation).

5 Plaintiff's Eighth Amendment claim fails as a matter of law. Prison officials in this case  
6 were not deliberately indifferent to his allergy to fish. He was informed he should avoid fish and  
7 that the menu available to him had sufficient calories for self monitoring. Further, plaintiff has  
8 not set forth any evidence showing serious physical or emotional injury as a result of the decision  
9 not to provide a no-fish alternative. His conclusory statement that he suffered undue hardship is  
10 not sufficient to avoid dismissal. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). It does  
11 not appear that an amendment could cure this defect in the complaint. The court should  
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13 **GRANT** Defendant's motion to dismiss this claim.

14  
15 2. Personal participation.

16 While the court recommends that the Eighth Amendment claim for cruel and unusual  
17 punishment be dismissed, without leave to amend, the court also recommends that plaintiff be  
18 given another opportunity to amend the complaint to clarify his Fourteenth Amendment due  
19 Process and Equal Protection allegations. While the court cannot now determine what set of  
20 facts may give rise to such causes of action, since plaintiff is entitled to every reasonable  
21 opportunity to state a claim for relief, the court recommends that plaintiff give it one more try.  
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23 In doing so, the court reminds plaintiff that he must set forth the specific factual bases  
24 upon which he claims each defendant is liable. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir.  
25 1980). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of  
26 supervisory responsibility. Alleging liability based on the theory of *respondeat superior* is not

1 sufficient to state a claim under Section 1983. Padway v. Palches, 665 F.2d 965 (9th Cir. 1982):  
2 Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 n.58 (1978). Nor can  
3 individuals be sued for damages under Section 1983 in their official capacities. Will v. Michigan  
4 Dept. of State Police, 491 U.S. 58 (1989).

5 The inquiry into causation must be individualized and focus on the duties and  
6 responsibilities of each individual defendant whose acts and omissions are alleged to have  
7 caused a constitutional violation. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).

9 Defendants move for dismissal and argue:

10 The Plaintiff fails to allege the personal participation of any of  
11 the Defendants. He provides one conclusory statement that they all  
12 failed to acknowledge his “no-fish diet” but he does not state how any  
13 of them were specifically involved. It is difficult to know how the  
14 grievance coordinator for the institution was involved in the denial of  
15 his diet. At best, the grievance coordinator probably processed his  
16 grievances regarding his diet, but this is not sufficient to show that  
17 Defendant Wesner participated in the actions alleged. He also does  
18 not provide any specific allegations against Defendants Van Boening  
19 or Lamas. Absent any sort of specific showing of how any of the  
20 defendants participated in the alleged allegations, he has failed to  
21 state a claim and the complaint should be dismissed.

22 (Dkt. # 12, page 7). Plaintiff alleges he filed a grievance when the dietician, who did not  
23 accept service by mail, took away his no-fish diet (Dkt. # 4, page 3). He does not state that any of  
24 the remaining defendants played a part in the decision to change his diet or whether they played  
25 any role in the review of that decision. The present complaint is insufficient.

26 However, this defect could possibly be cured by amendment. If a complaint is dismissed  
for failure to state a claim, leave to amend should be granted unless the court determines that the  
allegation of other facts consistent with the challenged pleading could not possibly cure the  
deficiency. Bonanno v. Thomas, 309 F.2d 320, 322 (9th Cir.1962). Leave to amend, whether  
requested or not, should be granted unless amendment would be futile. Schreiber Distributing

1 Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.1986). The court should **GRANT**  
2 defendant's motion on this issue, but plaintiff should be given leave to amend. If plaintiff can  
3 provide sufficient information that describes personal participation by one or more of the  
4 defendants that violates his Fourteenth Amendment Due Process rights or his Equal Protection  
5 rights, then the court will consider such an amended complaint.

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7 3. Qualified Immunity.

8 State officials are entitled to qualified immunity unless they violated clearly established  
9 law of which a reasonable person should have known. Harlow v. Fitzgerald, 457 U.S. 800,  
10 (1982). When evaluating the issue of qualified immunity, the court follows a two-part test: (1)  
11 whether the facts alleged "show [that] the officer[s'] conduct violated a constitutional right"; and  
12 (2) whether the constitutional right in question was "clearly established" such that "it would be  
13 clear to a reasonable officer that his conduct was unlawful in the situation he confronted."  
14 Saucier v. Katz 533 U.S. 194, 201-02 (2001); *see also* Estate of Ford v. Ramirez-Palmer, 301  
15 F.3d 1043, 1050 (9th Cir.2002).

17 It is well established that Inmates have the right to be provided with food that keeps them  
18 in good health yet satisfies the dietary requirements of their religion. McElyea v. Babbitt, 833  
19 F.2d 196, 198 (9th Cir. 1987). However, this right must be balanced against budgetary and  
20 administrative concerns of the prison. Ward v. Walsh, 1 F.3d 873 (9th Cir. 1993). The parties  
21 disagree as to whether the actions taken by prison officials allowed plaintiff to have an adequate  
22 amount of food and whether the food kept him in good health or subjected him to an  
23 unreasonable risk. The subjective motivation of the defendants is also at issue as the Court is  
24 considering an Eighth Amendment claim where the state of mind of the defendant is an element  
25 of the violation. The record before the court is insufficient to determine if qualified immunity is  
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1 appropriate in this case. The motion to dismiss based on qualified immunity should be **DENIED**  
2 at this stage of the proceeding.

3 4. Due Process and Equal Protection.

4 In the response to the motion to dismiss plaintiff argues his right to Due Process under  
5 the Fourteenth Amendment and his right to Equal Protection under the Sixth Amendment were  
6 violated when the dietician removed his no fish diet. These are in addition to the Eighth  
7 Amendment claim (Dkt # 16, page2). Neither of these causes of action is articulated in the  
8 original complaint (Dkt. # 4). Plaintiff should be given a chance to inform the court and the  
9 defendants of the facts surrounding these claims.  
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11 Leave to amend should be granted unless the court determines that the allegation of other  
12 facts consistent with the challenged pleading could not possibly cure the deficiency. Bonanno v.  
13 Thomas, 309 F.2d 320, 322 (9th Cir.1962). Leave to amend, whether requested or not, should be  
14 granted unless amendment would be futile. Schreiber Distributing Co. v. Serv-Well Furniture  
15 Co., 806 F.2d 1393, 1401 (9th Cir.1986). The court should give plaintiff leave to amend to  
16 articulate his position and the facts relating to these two causes of action.  
17

18 CONCLUSION

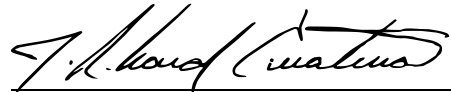
19 Plaintiff's Eighth Amendment claim is without merit given the facts presented. Leave to  
20 amend will not cure the defect and the defendant's motion to dismiss this claim should be  
21 **GRANTED.** Plaintiff should be given leave to file an amended complaint that sets for the facts  
22 and basis for his Fourteenth Amendment Due Process claim and his Sixth Amendment Equal  
23 Protection Claim.  
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25 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
26 Procedure, the parties shall have ten (10) days from service of this Report to file written



1 objections. *See also*, Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
2 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
3 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **June**  
4 **5, 2009**, as noted in the caption.

5 DATED this 5<sup>th</sup> day of May, 2009.

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9 J. Richard Creatura  
10 United States Magistrate Judge  
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